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March 19, 2007

VIA HAND DELIVERY

Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
12100 Park 35 Circle
Austin, Texas 78753

Re: Docket No. 2006-1830-MSW
In re The Application of McCarty Road Landfill, Tx., L.P.
No. MSW-261B

Dear Ms. Castañuela:

Enclosed for filing is AN/WRI Partnership, Ltd., AN/WRI Partnership #1, Ltd., Weingarten Realty Investors, WRI/7080 Express Lane, Inc., and Eagle Ind., L.P.'s Reply to Responses to Requests for Hearing in the above referenced matter.

Should you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,



MONICA JACOBS

MJ:jn
Enclosure

cc: Mr. Scott A. Humphrey (via facsimile and regular mail)
Ms. Diane Goss (via facsimile and regular mail)
Mr. Paul G. Gosselink (via facsimile and regular mail)
Mr. Duncan C. Norton (via facsimile and regular mail)
Mr. Jeffrey S. Reed (via facsimile and regular mail)
Ms. Snehal R. Patel (via facsimile and regular mail)
Ms. Martina E. Cartwright (via facsimile and regular mail)

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 MAR 19 PM 4:35
CHIEF CLERKS OFFICE

IN RE THE APPLICATION OF
MCCARTY ROAD LANDFILL, TX., L.P.
NO. MSW-261B

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERK'S OFFICE

2007 MAR 19 PM 4:35

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**AN/WRI PARTNERSHIP, LTD., AN/WRI PARTNERSHIP #1, LTD.,
WEINGARTEN REALTY INVESTORS,
WRI/7080 EXPRESS LANE, INC., AND EAGLE IND., L.P.'S
REPLY TO RESPONSES TO REQUESTS FOR HEARING**

INTRODUCTION

Even under ideal circumstances, landfill applications are lengthy and complicated. The application to vertically expand the McCarty Road Landfill ("Application") is being considered in light of circumstances that are far from ideal. The McCarty Road Landfill ("Landfill") is over thirty years old, was constructed largely before Subtitle D regulations came into existence, and has existing, significant problems with groundwater contamination and landfill gas migration. In addition, the Landfill is located immediately adjacent to numerous businesses and homes. Consequently, the number of issues raised by AN/WRI Partnership, Ltd., AN/WRI Partnership #1, Ltd., Weingarten Realty Investors, WRI/7080 Express Lane, Inc., Eagle Ind., L.P. (collectively "AAWWE") and others are numerous and varied. AAWWE respectfully requests that the Commission keep this context in mind when considering the number and types of issues that should be examined at hearing.

Counsel for the Executive Director ("ED"), the Office of the Public Interest Counsel ("OPIC"), and McCarty Road Landfill, TX, L.P. ("Applicant") have all analyzed the various hearing requests and issues raised at some length. Accordingly, AAWWE will attempt to be as brief as possible in its response. Overall, as detailed below, AAWWE agrees with most of the issues identified by the ED, OPIC and the Applicant as issues that should be referred for hearing;

however, certain important issues have been omitted by the Applicant. In addition, as is discussed below, the Applicant is attempting to inappropriately narrow the issues by listing specific regulatory provisions for referral. Before discussing specific issues, AAWWE will address comments made by the Applicant regarding AAWWE's qualifications for affected person status and the criteria that should be used in evaluating whether particular issues should be referred for hearing.

**I. Determination of Affected Person Status
and Criteria for Evaluating Issues**

A. Affected Person Status.

In Part III.A of its response, the Applicant correctly states that "Weingarten is comprised of a collection of several entities, as described in their two hearing requests." The Applicant then goes on to state that these entities "have not provided sufficient information in their hearing request to determine whether each qualifies for affected person status. However, [the Applicant] has no objection to any or all of these entities being granted affected person status, provided they are aligned." AAWWE appreciates that the Applicant has no objection and assures the Applicant and other potential parties that the listed entities have every intention of being aligned for hearing purposes.

With respect to the Applicant's difficulty in discerning the qualifications of each entity as affected persons, AAWWE respectfully directs the Applicant to the "Attachment A" that was included with both of AAWWE's requests for hearing (February 11, 2005 and October 13, 2006). Attachment A consists of an aerial map with a key detailing the locations of the properties owned by each of the listed entities; street names, *e.g.*, Mesa Road, are included for orientation purposes. In addition, AAWWE's letters describe the uses of these properties and their location with respect to the landfill, *i.e.*, immediately adjacent on the west and south of the

landfill. Because these properties—as shown on the map—are tightly grouped, each of the entities designated collectively in the requests for hearing as “Weingarten” has the same concerns regarding the proposed expansion of the Landfill. To assist in alleviating further confusion, for purposes of this reply, these property owners will be identified as “AAWWE,” indicating the full participation, interest, and affected person status of each entity.

B. Criteria for Evaluating Issues.

In its response, the Applicant appears to be attempting to raise the threshold for identifying issues that are appropriate for referral to the State Office of Administrative Hearings (“SOAH”). As the Applicant notes, Volume 30, Texas Administrative Code Section (“Section”) 55.211(b)(3)(A)(i) directs the Commission to “specify the number and scope of the specific factual issues to be referred to SOAH.” In this context, however, “specific” does not mean, as the Applicant asserts, that these issues must be “supported by a specific allegation of failure to comply with the Commission’s regulations.” Texas courts have long recognized that, as a matter of policy, the right to participate in agency proceedings should be liberally construed so that agencies have the benefit of being apprised of diverse viewpoints in order to determine where the public interest lies and how it should be furthered. *See Fort Bend County v. Tex. Parks & Wildlife Comm’n*, 818 S.W.2d 898, 899 (Tex. App.—Austin 1991, no writ); *Railroad Comm’n of Tex. v. Ennis Transp. Co.*, 695 S.W.2d 706, 710 (Tex. App.—Austin 1985, writ ref’d n.r.e.); *Texas Indus. Traffic League v. Railroad Comm’n of Tex.*, 628 S.W.2d 187, 197 (Tex. App.—Austin) rev’d on other grounds, 633 S.W.2d 821 (Tex. 1982). The requirement of listing the regulations associated with each issue would effectively eliminate from consideration issues raised by the vast majority of affected persons.

Listing applicable regulations has not been a requirement for referral of an issue to SOAH. *See, e.g.,* Attachment 1, October 4, 2004, Interim Order regarding Application by Southern Crushed Concrete. Nowhere in the requirements for hearing requests or the requirements for responses to hearing requests does it require the listing of particular regulations. 30 TAC §§55.201(d), 55.209(e). In reality, requestors need only explain “in plain language” and “to the extent possible” how they will be adversely affected and the issues that are in dispute. 30 TAC §55.201(d). If necessary, the Administrative Law Judge (“ALJ”) has the discretion to further narrow the issues if he or she sees fit to do so. *See* 1 TAC § 155.15. ALJs will in fact sometimes request that the parties file pleadings and allow argument regarding which regulations are applicable to the hearing.

In sum, at this stage in the process, the Commission should err on the side of including rather than excluding issues for consideration and should refrain from limiting the scope of the issues with regulatory citations.

II. Issues for Hearing

A. Response to Applicant’s Objections to Certain Issues.

In Part V of its response, the Applicant addresses issues that it considers inappropriate for referral to SOAH. AAWWE’s brief response to portions of the Applicant’s discussion is as follows. (Please note that although some of the issues discussed are not specifically attributed to AAWWE, AAWWE nevertheless feels that they are important and related to AAWWE’s own concerns, and therefore warrant a response here.)

1. Issue: Air Emissions, Including Particulates, from Truck Traffic.

The Applicant maintains that this issue is not relevant and material to the Application and therefore should not be referred to SOAH. The Applicant is mistaken. This mistake may be due to the use of the term “air emissions,” which may have a different meaning to a lay person as opposed to a regulator or landfill operator. In this case, the issue raised specifically addresses particulates due to truck traffic. The Applicant has stated that the vertical expansion may necessitate the importation of soil material for landfill cover purposes. Such importation is likely to increase the opportunities for fugitive dust, *e.g.*, due to soil handling, vehicle tracking, increased vehicle traffic, *etc.* Consequently, the issue of whether the Application effectively controls dust (identified as Issue No. 23 by the ED and Issue No. 7 by OPIC) is relevant and material and should be referred to hearing.¹

2. Issue: Whether the Draft Permit Complies with the Intent of Subtitle D and Texas Health and Safety Code, Chapter 361.

The Applicant states that this issue raises a question of policy, not a disputed question of fact, and therefore should not be referred to SOAH. At the same time, the Applicant recognizes that this issue is related to the issues of fact regarding groundwater contamination, which the Applicant agrees should be referred. As support for its position, the Applicant cites (in Part III.B of its response) Section 55.211(b)(3)(B), which states that in determining whether a hearing request meets the requirements of this subchapter, “if the request [for hearing] raises only disputed issues of law or policy” the Commission may either “make a decision on the issues and act on the application; or direct the chief clerk to refer the hearing request directly to SOAH.” Since the current situation is not one in which the hearing request raised only issues of law or

¹ Section 330.127(b) provides that “[d]ust from on-site and other access roadways must not become a nuisance to surrounding areas.” In addition, Section 330.123 addresses means to “effectively secure the load [from vehicles hauling waste] in order to prevent the escape of any part of the load by blowing”

policy, as the Applicant acknowledges, this particular section is not applicable to this point. Section 55.201(d)(4), however, is relevant. Section 55.201(d)(4) requires that a hearing request “substantially comply” with the hearing request requirements, which include listing “any disputed issues of law or policy” Clearly, the fact that an issue is one of law or policy does not automatically make it inappropriate for referral to SOAH. Also, as the Applicant acknowledges, this issue is a mixed issue of fact and law, that is in dispute, and it is entirely within the Commission’s discretion to refer it to SOAH.

Similarly, the Applicant seems to equate vagueness with breadth, when the two are often not synonymous. For example, the protestors’ assertion that the Application does not meet the standards for adequate protection of human health or the environment is broad in the scope of the statutes and regulations it encompasses, but it is not vague. *See, e.g., TEX. HEALTH & SAFETY CODE §361.89(a)* (stating that the Commission, may, for good cause, deny or amend a permit it issues or has authority to issue for reasons pertaining to public health, air or water pollution, or land use). This issue is also a disputed issue that should be referred to SOAH.

3. Issue: Closure and Post Closure.

The Applicant maintains that AAWWE’s concerns regarding closure and post closure are in fact a collateral attack on the rules and therefore do not raise a disputed question of fact. Arguments relating to collateral attacks are specious because in order for an issue to be referred, the rules only require the issues to be relevant and material to the decision on the Application and involve a disputed question of fact. It is undisputed that issues of closure and post closure are entirely part of the Application and are therefore relevant and material; however, what is in dispute is the adequacy of the closure and post-closure provisions. Although the Applicant misinterprets the nature and basis of AAWWE’s concern, the ED does not, and states the issue as

follows: whether the Application provides for adequate closure and post closure. *See* ED Response, Recommended Issue No. 13. For example, AAWWE's concerns regarding the shallow nature of the groundwater monitoring system are closely related to concerns stated elsewhere in AAWWE's October 13, 2006 request for hearing regarding whether the Applicant has in fact identified the scope of the contaminant releases into the groundwater. Said another way, AAWWE is concerned that the Applicant may not have adequately characterized the subsurface and thus the scope of the contamination. Since the groundwater monitoring system described in the Application is ostensibly based upon the Applicant's understanding of the subsurface and the scope of the contamination, AAWWE is concerned, as it stated, that "the limited shallow, lateral monitoring" will not provide the protection required by applicable statutes and regulations. And if the groundwater monitoring system is currently deficient, it will certainly be deficient upon closure and during the post-closure period. Therefore, the issue of whether the Application provides for adequate closure and post closure is relevant and material and should be referred for hearing.

B. Issues for Referral.

AAWWE agrees with the basic issues as identified by OPIC and the ED, with some revisions. AAWWE has listed the issues that should be referred to hearing below and has attempted to incorporate those listed by both OPIC and the ED. In addition, all of the issues identified by the Applicant are included below and noted in parentheses. As previously stated, it is AAWWE's position that it would be inappropriate at this stage to require the listing of all applicable statutes and regulations and that regardless, the Applicant's list of applicable regulations is incomplete.

Issue	
1	Whether the Application is adequately protective of groundwater in light of past and current contamination problems. (Applicant Issue 3 ²)
2	Whether the Application adequately provides for the monitoring and control of landfill gases in light of past and current gas migration problems. (Applicant Issue 6)
3	Whether there is a risk of vectors infestation due to the significant increase in waste contemplated in the Application. (Applicant Issue 2)
4	Whether the stability analysis was performed correctly. (Applicant Issue 7)
5	Whether natural drainage patterns will be significantly altered. (Applicant Issue 1)
6	Whether the Application adequately addresses nuisance odor conditions. (Applicant Issue 5)
7	Whether dust will be adequately controlled.
8	Whether windblown debris will be adequately controlled. (Applicant Issue 8)
9	Whether the Application is protective of human health.
10	Whether the Application's closure and post-closure plans are adequately protective.
11	Whether training, documentation, and notification procedures provided in the Application are adequate.
12	Whether the landfill cover will be maintained in a protective manner.
13	Whether the Applicant's compliance history has been correctly considered. (Applicant Issue 9)
14	Whether the Application is adequately protective of surface water. (Applicant Issue 4)
15	Whether traffic impacts are correctly considered in the Application. (Applicant Issue 10)
16	Whether the Application adequately addresses the tracking of mud onto public roadways. (Applicant Issue 11)
17	Whether the Application adequately considers the impacts of the proposed vertical expansion on the pre-subtitle D landfill cells and liner systems.

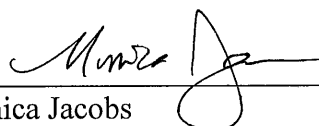
² This issue in particular highlights the inadequacy of the list of applicable regulatory provisions set forth by the Applicant. Section 330.56 contains the requirements for the development of the Site Development Plan. Subsection (d) details the requirements for the geology report, which includes a groundwater investigation report; subsection (e) provides the requirements for the Application's Groundwater Characterization Report; subsection (f) contains the requirements for the Groundwater and Surface Water Protection Plan; and subsection (k) details the requirements for the Groundwater Sampling and Analysis Plan. Consequently, these regulations should be also be included in the consideration of Issue 3 in addition to the regulations listed by the Applicant.

Sections 330.230-231 and 330.234-238 deal with groundwater monitoring and corrective action. Amazingly, the Applicant states in its Exhibit A that there are no genuine issues of fact regarding the ongoing corrective action and remediation of the existing groundwater contamination at the Landfill that pertain to the Application at issue. As AAWWE has explained in its protest letters, it has serious, well-founded concerns regarding (a) whether the Applicant has adequately identified the scope of the releases into the groundwater; and (b) whether such releases will be exacerbated by the weight of the vertical addition. These concerns are in turn directly linked to how the Applicant has attempted to address the existing contamination and whether the proposed monitoring system and existing remediation measures will be adequate to identify and deal with additional contamination caused by the vertical expansion. The corrective action itself is discussed at some length in the Application. Finally, Section 361.011(d) of the Texas Health and Safety Code states that "[i]n matters relating to municipal solid waste management . . . the commission shall consider water pollution and water quality aspects" Consequently, the corrective action at the Landfill and these statutory and regulatory provisions are extremely relevant to the issue of whether the Application is adequately protective of groundwater at the site and surrounding residential and commercial areas.

III. Conclusion

The "AAWWE" entities request that the Commission find that they are affected persons and grant their hearing requests. For the reasons described above, AAWWE requests that the issues described in the table in Part II.B of this response be referred for consideration at hearing. Given the complexity and number of issues involved, AAWWE agrees with the Applicant that a period of 11 months should be allowed for the hearing process.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this the 19th day of March, 2007, a true and correct copy of the forgoing document was sent by hand delivery, facsimile and regular mail to the following:

For the Chief Clerk:

Ms. LaDonna Castañuela
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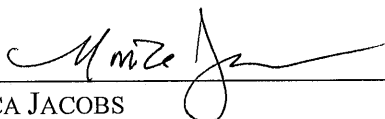
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MONICA JACOBS

ATTACHMENT “1”

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN INTERIM ORDER

concerning the application by Southern Crushed Concrete, Inc. to authorize the relocation of a portable rock crushing facility; TCEQ Docket No. 2004-0839-AIR.

THE STATE OF TEXAS
COUNTY OF TRAVIS
DEC 15 2004
I hereby certify that this is a true and correct copy of a
Texas Commission on Environmental Quality document,
which is filed in the permanent records of the Commission.
Given under my hand and the seal of office on

LaDonna Castanuela

LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental Quality

On September 29, 2004, the Texas Commission on Environmental Quality (Commission) considered during its open meeting requests for hearing submitted by numerous individuals, associations, and parties, as well as a request for reconsideration submitted by the City of Houston, concerning the application by Southern Crushed Concrete for a modification of Air Quality Permit No. 70136L001 (formerly Permit No. 40072) to authorize the relocation of a portable rock crushing facility in Harris County, Texas. The requests for hearing and the request for reconsideration were evaluated in accordance with the requirements of applicable statutes and Commission rules, including 30 Texas Administrative Code Chapter 55. The Commission also considered the responses to the hearing requests filed by the Executive Director, the Office of Public Interest Counsel, and the Applicant; replies to the responses filed by the City of Houston, Citizens Against Southern Crushed Concrete, and Texas Pipe & Supply Co, Inc.; all timely public comment; and the Executive Director's Response to Public Comment.

After evaluation of all relevant filings and the answers to questions during its meeting, the Commission denied the request for reconsideration. The Commission then determined that the City of Houston, Citizens Against Southern Crushed Concrete, and Texas Pipe & Supply Co, Inc., are all affected persons, as provided by applicable law. The Commission then granted the requests for a contested case hearing filed by the City of Houston, Citizens Against Southern Crushed Concrete, and Texas Pipe & Supply Co, Inc. The Commission determined that the other requestors had not demonstrated they were affected persons, and denied their requests. The Commission determined that the State Office of Administrative Hearings (SOAH) hearing shall be held in Houston, Texas.

The Commission next determined whether the requests for hearing raised disputed issues of fact that were raised during the comment period, and whether the raised issues are relevant and material to its decision on the application. The Commission directed the Commission's Chief Clerk to forward to SOAH the following disputed and relevant and material issues of fact that were raised during the comment period:

- (1) Would operation of the facility have an adverse effect on the health of the requesters who live within one mile of the facility?;
- (2) Would operation of the facility adversely affect the ability of the requesters to use and enjoy their property or cause damage to the requester's property?;
- (3) Would operation of the facility have an adverse effect on air quality?;
- (4) Whether or not the Applicant's emissions calculations and modeling are accurate?;
- (5) Is a stockpile limitation necessary and are stockpile emissions adequately addressed in the permit conditions?; and
- (6) Whether or not the record keeping requirements set forth in the draft permit are sufficient to enable enforcement?;

The Commission also specified that the maximum duration of the contested case hearing shall be six months from the first day of the preliminary hearing to the date the proposal for decision is issued by SOAH.

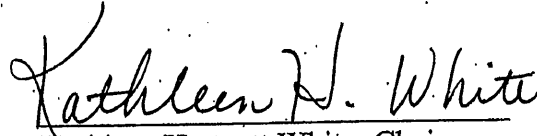
NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

- (1) The request for reconsideration submitted by the City of Houston is DENIED;
- (2) The requests for hearing submitted by the City of Houston, Citizens Against Southern Crushed Concrete, and Texas Pipe & Supply Co, Inc. are GRANTED;
- (3) All remaining requests for hearing are DENIED;
- (4) The Chief Clerk shall refer to SOAH the following issues for a contested case hearing: (a) Would operation of the facility have an adverse effect on the health of the requesters who live within one mile of the facility?; (b) Would operation of the facility adversely affect the ability of the requesters to use and enjoy their property or cause damage to the requester's property?; (c) Would operation of the facility have an adverse effect on air quality?; (d) Whether or not the Applicant's emissions calculations and modeling are accurate?; (e) Is a stockpile limitation necessary and are stockpile emissions adequately addressed in the permit conditions?; and (f) Whether or not the record keeping requirements set forth in the draft permit are sufficient to enable enforcement?;

- (5) The maximum duration of the hearing is six months from the first day of the preliminary hearing to the date the proposal for decision and recommended order is issued by SOAH; and
- (6) The SOAH hearing shall be held in Houston, Texas.

Issue date: OCT 04 2004

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY


Kathleen Hartnett White, Chairman